IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-459

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor by his mother and next friend, VELMA SMITH,

Petitioners,

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATCLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY, as Superintendent of Pawnee School District; JAMES COLLINGS, as Principal of Pawnee Union High School,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Petitioners file this brief in reply to the brief of respondents in opposition to petitioners' petition for writ of certiorari to the United States Court of Ap-

peals for the Tenth Circuit. Petitioners' replies to respondents' arguments follow in the same order as respondents' arguments appear in their brief.

ARGUMENT

I. Respondents' Statement of Facts Shows That There is No Dispute Between the Parties as to Any Essential Facts

There is no dispute between petitioners and respondents as to those facts which are necessary to a determination of the three issues before this Court. Respondents' statement of the case merely supplements petitioners' facts with facts which are not necessary to the decision. For example, it is irrelevant that "Militant Indian Leaders" threatened to bring the town and the school to its knees, and that the exception "was becoming a source of controversy" (Respondents' Brief, p.5), because respondents have admitted throughout all proceedings in this case that there was absolutely no disruption in the classrooms due to petitioners' long hair (I:55; II:78, 83-84, 91; III:13, 14). Similarly, it is irrelevant that some Indian students did not desire the exception for long braids (Respondents' Brief, p.5): this Court is well aware of the principle that the rights of minorities in this nation cannot be predicated upon the whims of the majority.

Secondly, respondents state in their brief that Muriel H. Wright testified that there "was" no tradition or custom among male members of the Pawnee tribe to wear long braided hair (Respondents' Brief, p.5). This is an incorrect statement of Miss Wright's testimony. To the contrary, Miss Wright very pointedly testified that "there *is* no tradition" (II:94, emphasis added). An examination of the record as a

whole shows the importance of the "is"—"was" distinction. Miss Wright, on cross examination, admitted that some older Pawnees still wear long braided hair (II:99-100).[1] Respondent Holloway, the school superintendent, testified that the school board recognized long braided hair as "an Indian tradition" (II:82; III:10). The fact that many Pawnees no longer wear the traditional braided hairstyle is poignantly explained by the record: the uncontradicted testimony is that the specific, intentional policy of the Bureau of Indian Affairs until the 1930's was to strip Pawnees and other American Indians of their traditions, including their traditional hairstyles (II:18, 19, 63-64, 100, 116). Today, modern Pawnees, and other Indians, are undergoing a rebirth of the old traditions, including hairstyle (II:20, 61, 100-101).

Accordingly, the record can be fully and fairly reconciled as follows: (1) Pawnee males traditionally wore their hair in one of two styles, long and braided, or in a roach;[2] (2) most male Pawnees stopped adhering to their traditional hairstyle due to the federal Indian policy of suppression of Native American cultures; (3) today a few old Pawnee men, along

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[1] Defendants also refer to a newspaper article supporting the proposition that Pawnee Indians "have not worn their hair long for 50 years or longer." (Respondents' Brief, p. 4). An indisputable inference from this statement is that Pawnees once wore their hair long. In addition, this statement, which was contained in a newspaper article without factual foundation concerning the expertise of the speaker, is contradicted by several photographs in the record including one—taken in 1949—from the book written by defendants' expert. (II:99)

[2] Petitioners have always admitted that the roach, or scalp lock, is one of the customary hairstyles of the Pawnee male along with the long braided hairstyle.

with an increasing number of younger Pawnees, wear their hair in the old customary style of long braids. Significantly, then, both petitioners and respondents flatly agree that the long braided hairstyle was one of two customary hairstyles among Pawnee males in past years, and that, although the style has declined in recent years, some Pawnee males still practice the custom.

II. A Decision for Petitioners Would Not Require Reversal of United States v. O'Brien Nor Would It Result in a Deluge in the Federal Courts of Symbolic Speech Cases

This Court is not required to overrule *United States* v. *O'Brien,* 391 U.S. 367 (1968), should it decide in favor of petitioners (Respondents' Brief p.10). In *O'Brien*, the Court disposed of the speech issue by holding that, even if O'Brien's conduct constituted "speech", the governmental interests in that case outweighed that First Amendment right. *O'Brien, supra at* 376. The Court was not required to, and did not, reach the question of whether the conduct constituted "speech." Thus, petitioners continue to believe that this Court should grant certiorari to develop a definition of symbolic speech.

Adoption by this Court of the two-part test urged by petitioners[3] will not result in a "deluge" of symbolic speech cases (Respondents' Brief, pp. 10-11). Most of the symbolic speech cases now before the federal courts are there because of confusion among the courts and the bar as to what conduct constitutes

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[3] The two-pronged test suggested by petitioners in their Petition for Certiorari was recently adopted by the Colorado Supreme Court in *People* v. *Vaughan*, No. 25279 (S.C. Colo., October 1, 1973).

symbolic speech. Adoption of a definition of symbolic speech would thus almost certainly clear the courts of many cases because the conduct involved failed to meet the two-part test; this is particularly true in regard to the second part of the test; namely, whether the intended communication was recognized as speech by others.

III. State Action Although Even-Handed on its Face May Deny Equal Protection if a Group of Persons Within the Affected Class is Not Situated Similarly to the Rest of the Class and as a Result Bears a Disproportionate Burden

It is clear from two recent decisions of this Court in *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972), and in *Norwood* v. *Harrison,*——U.S.——, 37 L.Ed.2d 723 (1973), that it is the discriminatory *effect* of state action, not the intent, which is determinative of a violation of the equal protection clause of the United States Constitution. As this Court stated in *Norwood* v. *Harrison*:

> [G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia,* . . . The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal. [37 L.Ed.2d at 732.]

Thus, it is constitutionally irrelevant whether the hair rule is applicable to all students alike. The crucial question is whether the *effect* of the hair rule is discriminatory toward male Pawnee Indians who

wear long braided hair to express their racial, cultural, and religious beliefs. The record in this case shows that petitioners are not situated similiarly to the other male students in Pawnee schools in regard to the significance of long braided hair; therefore, the hair rule—though even-handed on its face and though enacted with the best of intentions—imposes a much heavier burden upon petitioners and thus denies petitioners the equal protection of the law.

IV. Within the Context of the Pawnee Faith, Petitioners Did Express Their Belief that Long Braided Hair Has Religious Importance in the Pawnee Religion

In the traditional Pawnee culture or way of life, those activities which the non-Indian society would classify as religious were in fact indistinguishable to the Pawnee from those activities which non-Indians would classify as secular. The record shows that activity of Pawnee daily life must be carried out in harmony with the Pawnee-perceived order in the universe. To live in harmony with the universal order is the highest sacred goal for every Pawnee. Long braided hair worn by Pawnee males was perceived to be the correct or ordered hairstyle for men in times of peace. This, then, is the sacred or religious significance of long braided hair in Pawnee life (II:16-18; *see also* Petition, App. F at 9a, 12a).

Because the Pawnee culture recognizes no rigid separation between the sacred and the secular, Pawnees—and especially children—cannot be expected to categorize their cultural practices as being either religious or non-religious. Thus, when petitioners stated that they wish to wear long braided hair in order to follow the traditional ways of the

Pawnee, they were communicating their desire to practice an aspect of the Pawnee faith, i.e., the ancient belief that long braided hair has a predesignated and ordered place in the Pawnee concept of the ordered universe.

Neither the trial court nor the appellate court questioned petitioners' assertion that they wore their hair long and braided for religious reasons. With regard to this issue, the appellate court decided that where courts are unable to perceive a conventional belief standard by which to distinguish between religious activities and non-religious activities of a faith, courts must totally refrain from deciding whether a particular activity is within the protection of the First Amendment free exercise clause. Thus, the decisions of the lower courts did not rest upon respondent's argument (Respondents' Brief, p.7, 12, 13) that wearing of long braided hair is not rooted in a sincere religious belief of the Pawnee Tribe.

Finally, respondents suggest that *Wisconsin* v. *Yoder,* 406 U.S. 205 (1973), is fundamentally distinguishable from the case at bar (Respondents' Brief, p.13). To the contrary, the opinion in *Wisconsin* v. *Yoder* is charged with language which shows the direct correlation between the Amish religion and the Pawnee religion. Like the Pawnee religion, the Amish religion "pervades and determines the entire mode of life of its adherents." 406 U.S. at 210. We have emphasized here the fact that this case involves the Pawnee culture and way of life, which is virtually inseparable from the religion; the opinion in *Wisconsin* v. *Yoder* accepts this point by referring repeatedly to the Amish "way of life," as well as to the Amish re-

ligion. *See* 406 U.S. at 209, 210, 211, 215, 216, 217, 218.[4] Both religions "deemphasiz[e] material success, reject the competitive spirit, and seek to isolate themselves from the modern world." *Wisconsin* v. *Yoder, supra,* 406 U.S. at 210. Both are based upon a "devotion to a life in harmony with nature and the soil." *Id.* Both ways of life are "inherently simple and uncomplicated" and in both cases their habits, including "their mode of dress," "set them apart from much of contemporary society." 406 U.S. at 217. Ultimately, the Court granted the protection to proponents of the Amish religion in spite of the fact that "in this context belief and action cannot be neatly confined in logic-tight compartments." 406 U.S. at 220. Precisely the same point applies here: because the Pawnee religion, like the Amish religion, pervades the entire way of life of its adherents, the result cannot be contained in a logic-tight compartment. As this Court recognized in *Yoder,* however, this is not a bar to relief.

Petitioners here seek an alternative remedy to that sought by the Amish in *Wisconsin* v. *Yoder.* Petitioners do not seek to be exempted from attending public school, but rather they seek to be allowed to carry on their Pawnee Indian way of life while attending public

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[4] In spite of this Court's opinion in *Wisconsin* v. *Yoder*, neither lower court was able to accord religious protection to a religion which, unlike the Judeo-Christian heritage, does in fact pervade the entire way of life of the religious sect. This type of reasoning permeates the Court of Appeals majority opinion (*see* especially, Appendix at F-17a) and is particularly visible in the concurring opinion, which, in essence, would deny religious protection because "the Pawnee are near-pantheists, their every act having religious significance in their basic desire to live in harmony with the Universe." Appendix at F-18a.

schools. Petitioners believe that they can be free to adhere to the Pawnee way of life while attending the public schools. Petitioners suggest to the Court that allowing them to retain their unique religious and cultural identity in public school will be a healthy situation for both the petitioners and the school. Petitioners' unique cultural perspective of the world can result in valuable learning experiences in the classrooms and can result ultimately in a much richer total educational experience. The Pawnee culture and religion offer a unique perspective of life; and by that very fact, they can, under the protection of the Constitution, make valuable contributions to the storehouse of ideas upon which this democracy is founded.

CONCLUSION

In the final analysis, the lower courts denied relief here because the facts do not fit into a "logic-tight compartment." Those courts read the Constitution in a purely non-Indian, Judeo-Christian context which supposedly requires so-called "amalgamation." The truth is that the Constitution has alway been flexible enough to protect those small minorities whose beliefs and practices do not fit into a mold cast by the majority. Such is the ultimate lesson to be drawn from cases such as *Wisconsin* v. *Yoder, Tinker* v. *Des Moines Community School District,* and *People* v. *Woody.* This Court should grant certiorari here to establish the principle that the reasonable exercise by Native Americans of their cultural, traditional, and religious values is accorded full protection by the United States Constitution.

Accordingly, petitioners respectfully submit that this Court should issue a Writ of Certiorari to review

the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

YVONNE T. KNIGHT
CHARLES F. WILKINSON
ROBERT S. PELCYGER
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Attorneys for Petitioners

Of Counsel:

Native American Rights Fund
SUSAN K. GRIFFITHS

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